No. 90-434

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

SONICRAFT, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY TO THE OPPOSITION TO GRANTING PETITION FOR WRIT OF CERTIORARI

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This case squarely presents the question whether the Section 10(b) statute of limitations provides an employer any protection against stale claims and whether the burden of proof approach formulated under Title VII for indirect evidence of discrimination applies as well to unfair labor practice litigation commenced under the NLRA. Both these issues have yet to be considered by this Court. Each deserves the Court's immediate attention as illustrated by the responses of the Board and the Intervenor Union here and the diversity of opinions which have issued from the appellate courts.

1. The Board's fundamental error occurs because it lacks caselaw to rely upon for the enterprising proposition that Section 10(b) should not be strictly construed. Rather, the Board contends the General Counsel's amendment to the unfair labor practice complaint against Sonicraft of discriminatory layoff allegations was not out of time because Section 10(b) empowers the Board to amend complaints at any time. Such generalized authority for this improbable proposition is string-cited on page 12 of its brief. However, *none* of those cases involve situations where there has been an intervening dismissal of the matter by the General Counsel or a withdrawal of the charge.

Consequently, this Court is confronted with a question not squarely faced in *Local Lodge 1424, Machinists v. NLRB*, 363 U.S. 411 (1960), wherein the Board had improperly attempted to assert jurisdiction to proclaim a collective bargaining agreement unlawful because it had no continuing jurisdiction to remedy unfair labor practices. In much the same manner, the Board attempts to resurrect matters previously dismissed from an unfair labor practice charge, beyond the six-month period. Through the vehicle of amendments, without any recognition that the NLRA imposes a broad statute of limitations to protect respondents (as articulated in *Machinists*), the Board violates the statute.

If Section 10(b) is to have any effective purpose, the protection and repose for respondents contemplated by Congress also must be applied to protect intervening events from the assertion of Board jurisdiction. The Board clearly is not empowered to initiate a charge. Permitting it to amend previously dismissed portions of a charge runs against the clear congressional mandate against self-initiating Board charges and is an attenuated policy argument at best.

The Board very carefully straddles its own caselaw with the Seventh Circuit's approving conclusion that the "closely related" doctrine is properly applied, without providing this Court with a clear statement how its current thinking in *Redd-I, Inc.*, 290 N.L.R.B. No. 140 (1988), is permissible in light of 10(b) and *Machinists*. It also attempts to distinguish *Ducane Heating Corp.*, 273 N.L.R.B. 1389 (1985), on the basis that there was in that case an "absence of any other pending charge."

That distinction is a misstatement. Since the Board did indeed find that *Ducane* applied here in the first remand in the instant case, the statute of limitations in 10(b) could only afford one result, *viz.*, dismissal. In *Ducane*, there were two sets of charges, one involving McCrea and one involving Robinson. Long after McCrea's charge was dismissed, the union sought to add McCrea's occurrences to Robinson's ongoing complaint. The Board refused the General Counsel's request, flatly stating that "[w]e hold today that a dismissed charge may not be reinstated outside the 6-month limitations period of Section 10(b) absent special circumstances in which a respondent fraudulently conceals

the operative facts." *Id.* at 1390. The Board expressly reversed its earlier decisions in *California Pacific Signs, Inc.*, 450 N.L.R.B. 450 (1977)(a dismissal case) and *Winer Motors, Inc.*, 265 N.L.R.B. 1457 (1982)(a withdrawn charge case), to the extent they were inconsistent. Consequently, the Board's proposed distinction of *Ducane* is contrary to the clear language and factual setting in that case.

Since *Ducane* rejected an attempt to add formally dismissed allegations to a complaint, the Board's current proposition that the closely related doctrine is not an impermissible mechanism to bypass 10(b), is erroneous. In *Ducane* the Board specifically found that its application of 10(b) to both dismissed and withdrawn charges is required under the statute and not to do so "would exceed our own authority." 273 N.L.R.B. at 1391. "In either event, the charge has been disposed of and, in effect, ceases to exist." *Id.*

Therefore, even when the Board points out to this Court that the Seventh Circuit found its silent departure from the express language of *Ducane* here not unreasonable, that does not authorize the agency to randomly ignore its own precedents and apply new legal theories in the face of express statutory language. To act as it deems fit without accountability to the rule of law and faithfulness to the statute, cannot be substantially justified action within the meaning of Section 10(f) of the Act.

The only other stab made by the Board at deflecting the critical need for this Court to review the decision below is through distinguishing the decisions of the First, Second, and Third Circuits in *NLRB v. Silver Bakery, Inc.*, 351 F.2d 37 (1st Cir. 1965), *NLRB v. Electric Furnace Co.*, 327 F.2d 373 (6th Cir. 1964), and *NLRB v. Wizard Method, Inc.*, 897 F.2d 1233 (2d Cir. 1990), in footnote 14, page 13-14 of its brief. The former two cases it claims involve an attempt to reinstate dead allegations without reference to any other pending charge and in the latter case, the Second Circuit in *Wizard Method* did not reach the question because it had not been timely raised (just as the General Counsel's failure to even raise the "closely-related" issue

to the ALJ should have barred him from doing so against Sonicraft ever since). Neither argument addresses the sound statutory policies underlying 10(b) articulated by these appellate courts.

We plead with the Court to recognize the critical importance of the issue. All the cases the Board claims do not conflict with the decision below, because of minor variations in the facts, do not deal with the effect of dismissals. Board Brief at 12 n.13. Given the known views of the First and Third Circuits, they would conflict with the Seventh Circuit's view here.[1]

The scope of the statutory puzzle further widens when the Court finds that in *Winer Motors, Inc.*, 265 N.L.R.B. at 1458, the Board expressly renounced its prior "equitable" rules regarding the amendment of complaints, and adopted the First Circuit's decision in *Silver Bakery, Inc.*, *supra*: "we agree with the First Circuit's assessment when it denied enforcement of our Order in *Silver Bakery* that reinstatement of charges beyond the 10(b) period based on equitable considerations was created out of whole cloth and that: ...'we can think of no good reason why the mere filing of a charge...should leave in the Board a roving discretion to determine that so-called equities warrant the reinstitution of proceedings without limit of time.'" *Quoting*, 351 F.2d at 39. Hence, the Board in *Ducane* found that its "sympathies in that regard [are] an insufficient basis to restrike the balance established by Congress when it added the proviso to

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[1]Involved here is the effect a final dismissal has on the central issue of a charge because the *Fant Milling* Court did not have before it the question whether there was a dismissal prior to amendment of the charge. *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959). Petitioner urges the rationale that once a charge is dismissed, it is gone. Since the Board is not authorized to self-initiate charges, it cannot do so either under the guise of an amendment.

Section 10(b). Accordingly, we hereby overrule *Silver Bakery* [150 N.L.R.B. 421 (1964)]."[2] *Id.*

It is inherently inconsistent policy for the Board to tell a respondent not to rely upon section 10(b) where portions of a case are dismissed or withdrawn and be always prepared to face the charge anew through an amendment to a different charge outside the 10(b) period. Therefore, the Court is told that where the General Counsel dismisses one part of a case and another portion remains, a respondent "reasonably remains liable for other closely related" charges, including the one upon which it had prevailed. This "rule" the Board claims is sufficient to put a respondent on notice to all other possible events during the pendency of the timely charge.[3] Brief at 15. In the face of 10(b), the "rule" is plainly fashioned out of the same "whole cloth" repudiated in *Ducane*, but is now said to be "traditional," as applied, to Petitioner.

Also noticeably absent from the Solicitor's brief, is that the new application of the closely related doctrine holds only a fleeting majority of the Board, as Chairman Stephens dissented in both the instant case and *Redd-I*, because the sequence of

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[2]The Board alleges in *Redd-I, Inc.*, the closely related doctrine it applied was "the traditional Board test," *Redd-I, Inc.*, 129 L.R.R.M. at 1231; Brief at 9 n.8. Yet, the only "test" the Board previously used was that the General Counsel had "virtually unlimited discretion" to reinstate previously dismissed charges. *California Pacific Signs, Inc.*, 233 N.L.R.B. at 451. Even in that case, the Board found that withdrawn charges via a private settlement could not be reinstated because of 10(b). *Id.*; *Koppers Co.*, 163 N.L.R.B. 517 (1967). Consequently, when the Board in *Redd-I*, 129 L.R.R.M. at 1231 n. 8, suggests that the closely related doctrine is well established, all its cases failed to involve dismissed or withdrawn charges.

[3]The Board places the burden of showing a denial of due process in these situations upon the charged party respondent. Fairness, the Board believes, is met by giving the respondent a brief opportunity to prepare after the amendment is made. Prejudice, the Board contends, does not overcome its perceived "duty to protect certain public rights." *Redd-I*, 129 L.R.R.M. at 1232.

events does not provide a respondent "even the most general notice" that it could be called upon to redefend the allegation. In his view, to do so would undermine the requisite statutory need for anything but the filing of simple non-specific charges: "I cannot agree with my colleagues that a charge has no notice function whatsoever. If it had no such function, there would be no reason for us to place the limitations of the relation back doctrine on subsequent amendments to a charge." *Redd-I, Inc.*, 129 L.R.R.M. at 1235. He further found that the majority cannot rationally believe that the intervening governmental act of a dismissal or withdrawal of a charge by the General Counsel would not lead a respondent to believe it might never again be called upon to defend that act or seek to preserve specific evidence for future litigation involving that situation. *Id.* Thus, 10(b) also serves to protect against abuse of process.

Finally, the Board does not deny that the Seventh Circuit unilaterally interposed the applicability of the case of *Stern Entertainment System, Inc.*, 290 N.L.R.B. No. 167 (1988)(2-1 decision), to prop up Board Counsel's attempt to prove that the Board's *Redd-I* precedent would apply to dismissed as well as withdrawn charges. It can only be surmised that *Stern* is applicable here since the Board never relied upon that case in ruling against Sonicraft, and *Redd-I* was a withdrawn charge case. If *Stern* is applicable to Sonicraft, it was the Board's obligation to say so, not the *post hoc* substituted reasoning of the Court of Appeals, which the Board does not deny has happened. *Metropolitan Life Ins. Co. v. NLRB*, 380 U.S. 438 (1965).

This Court should grant the Petition in this case and apply the rule enunciated by the Board in *Ducane*.

2. The dilemma posed in Petitioner's Second Question for employers, carefully not answered by the Board, is that the NLRA is a statute requiring the finding of discriminatory intent. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-44 (1954). It is how the Board finds intent from legitimate business acts which is now an important issue for the administration of the statute. *NLRB v. Brown*, 380 U.S. 278, 286 (1965).

The problem represented by this case is the readiness of the Board to infer intent from neutral facts and arguably 8(c) employer protected speech. This case was never tried as a so-called "mixed-motive" case and Sonicraft always contended that its actions were solely based on reasons of economic preservation. The Board's aversion to articulating and applying a proper burden of proof is highlighted by both the presentation made to the Court in footnote 16 of the Board's *brief* at page 16, where it recounts the ALJ's findings of "threats and promises" and footnote 3 of its *decision* where it does not find Jerry Jones' speech to violate 8(a)(1), Pet. App. 13a n.3, but now for the first time also contends that Sonicraft's conduct was not protected under 8(c) of the Act. Sonicraft argued that same conduct was protected throughout these proceedings, but neither the ALJ or the Board ever addressed the issue.

This case is not about the presence of any direct evidence of an intent to retaliate against employees for voting for the union. Rather, like a Title VII disparate impact case, the Board reaches for indirect evidence, much like the use of statistics and inferences drawn from the disparate impact case, *e.g.*, the business timing, especially if the employer opposes unionization. This Board presumption is well-known. *See* Pet. at 22 n.16.[4]

Yet, it was not the Board that ruled that "antiunion hostility motivated the mass layoff," but the Seventh Circuit. The Board nowhere balanced Sonicraft's rights under 8(c) and the statutorily

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[4]In this situation, the entire layoff was nondiscriminatory and cannot be conclusive, when the Board relies only upon the timing and nonadjudicated 8(c) employer protected conduct. An employer has no rational reason to affirmatively prove the neutrality of all the uncontrollable factors the Board might rely upon, since the General Counsel is at all times to carry the burden of proof, as the EEOC and plaintiffs do under Title VII in *Wards Cove*.

recognized economic defense under the "for cause" provision of Section 10(c).[5]

The Court might be inclined to believe that the Board employs the test approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), but there is not even a minimal reference to any articulation or application of a recognized burden of proof here. Sonicraft met its burden of proof in this case by articulating and presenting its precipitous decline in profits and excess inventory, but the proof was not recognized by the Board or the Seventh Circuit or was so-called "unpersuasive." Board's Brief at 17.

If the Board's General Counsel had litigated this case in conformance with *Transportation Management*, he would have offered independent proof that Sonicraft's business reasons were untrue. He could not , for the joint economic testimony proved otherwise. Rather, he rested, as has the ALJ and the Board, on the premise that the employer's proof can simply be disbelieved. This has become a pattern of typical behavior, because the known tests do not relate well to alleged pattern or practices cases. The Board's *Wright-Line* and *Transportation Management* tests have only been applied in routine discharge cases where an employer alleges a rote "for cause" defense. The Board enunciated no standard of proof here and the record is void of *any* reference to an applicable standard. Thus, references to *Transportation Management* is the dicta of Board counsel's *post hoc* arguments to the Seventh Circuit and this Court.

This realization is the imperative that must cause the Court to revisit the issue and apply the test articulated by the majority

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[5]The General Counsel claimed he received newly acquired corroborative evidence to resurrect the dismissed charge. This evidence is, at best, borderline protected speech, which could only breach the bar of 10(b) if there was fraudulent concealment. That occurrence the Board refused to find here. *See* Pet. App. 3a; 13a n.2 ("we find it unnecessary to reach the fraudulent concealment issue"); *Ducane*, *supra* at 3.

in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), that the government bears the burden of proof throughout these proceedings and put the NLRA and Title VII back on the same footing when using indirect evidence. Even the Board admits that "the Court applies in Title VII cases a rule analogous to the rule applied under the NLRA." Brief at 18. Unfortunately, the Board refuses to do likewise.

Finally, even if the Court were to find that the instant case involved a "mixed -motive" situation, the burden of proof standard represented in the recognized *McDonnell Douglas* test would enable the trier of fact and parties to present their cases in a logical sequence akin to disparate treatment cases as well. For in these types of cases, the employer comes forward with its explanation and the General Counsel would continue to bear the ultimate burden of proof. Since the Board now absolutely refuses to apply a test that might work, even under the deference previously given to it in *Transportation Management*, this case presents an opportunity to clarify the required standards of proof.

Petitioner's proposed standard would be workable and already works well under Title VII. As the dissenters in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1812 (1989), forecast in the civil litigation context, "almost every plaintiff is certain to ask for a *Price Waterhouse* instruction, perhaps on the basis of 'stray remarks' or other evidence of discriminatory animus." It is the same stray *remarks by persons unconnected with decisionmaking* and the confluence of neutral factors, such as the timing of an employment decision, from which the Board substitutes as intent. This case shows an abuse of the earlier deference given to the Board.

Similarly, Justice O'Connor's concurring opinion in *Price Waterhouse* reflects that even in an intermediate case of mixed motive, the employer's burden is to articulate valid supporting reasons that "demonstrate that with the illegitimate factor removed from the calculus, *sufficient* business reasons would have induced it to take the same employment action." 109 S. Ct. at 1804 (emphasis added). *See also* 109 S. Ct. at 1796 (White, J.

concurring in judgment)("where the legitimate motive found would have been ample grounds for the action taken...this should be ample proof.").

Finally, the proof the employer offers in support of its non-discriminatory reason should not be set aside by the Board and substituted for a discriminatory reason unless the General Counsel proves that the employer's reason is a pretext for discrimination. If the "judiciary should proceed with care before mandating that an employer must adopt" a Title VII plaintiff's proposed hiring practice, the Board should be similarly limited in restructuring employer practices. *Wards Cove*, 109 S. Ct. at 2127.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that the Court grant a writ of certiorari to the Seventh Circuit to review these important questions.

Respectfully submitted,

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